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Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of	)	
	)	
Distribution of	)	Docket No. 16-CRB-0009 CD (2014-17)
2014-2017	)	
Cable Royalty Funds	)	

In the Matter of	)	
	)	
Distribution of	)	Docket No. 16-CRB-0010 SD (2014-17)
2014-2017	)	
Satellite Royalty Funds	)	

MULTIGROUP CLAIMANTS' COMMENTS ON CLAIMANT CATEGORY DEFINITIONS AND PROPOSED MODIFICATION

Multigroup Claimants ("MC") hereby submits its *Comments on Claimant Category Definitions and Proposed Modification*, in response to the Judges' *Notice of Participants and Order for Preliminary Action to Address Categories of Claims* issued in this matter on March 20, 2019.

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ARGUMENT

A. THE CLAIMANT CATEGORY DEFINITIONS HISTORICALLY UTILIZED ARE NOT ADOPTED AS A MATTER OF LAW, BUT ARE THE PRODUCT OF STIPULATION AMONGST PHASE I PARTIES.

Historically, the claimant category definitions utilized by the CARP and CRB were the product of a stipulation amongst Phase I participants that originated in the 1990-1992 cable distribution proceedings, or possibly earlier. See **Exhibit A**. That is, contrary to a position oft-asserted by certain Allocation Parties (i.e., fka "Phase I Claimants"), the claimant category definitions are merely stipulations between the Phase I participants, and do not exist as a matter of law.

This was made explicitly clear in the colloquy between the JSC's counsel, Robert Garrett, and then Chief Judge Sledge on June 11, 2009, as part of the 2000-2003 cable distribution proceedings (Phase I):1

"**Chief Judge Sledge**:

> "I want to clarify on the record that the parties in this proceeding are adopting that framework by stipulation, and that is the framework under which we are operating here as result of stipulation, not as a result of any determination by the Judges.

1 In light of the fact that the excerpt has been cited and produced to the CRB on numerous occasions, MC has not attached the referenced transcript, but will produce it if desired by the Judges.

"**Mr. Garrett**:

"Yes, Your Honors. . . .

"**Chief Judge Sledge**:

"And implicit in that statement is *the stipulation that the parties are adopting the categories of Phase I that have never been determined by any regulatory group, but have been informally adopted by the parties in these distribution proceedings*. And those categories are what you're relying on in your Phase I proceedings?

"**Mr. Garrett**:

"Your Honor, I believe the answer to that is yes as well.

"And I will say, by way of history, there was a point, I believe it was in the 1983 litigated proceeding, where all the parties had agreed upon the definitions of the categories.

"I believe that the Copyright Royalty Tribunal in that case had accepted that as the – as the definition of the various categories, and we have used it consistently since then."

"**Chief Judge Sledge**:

"*And "accepted" is an important word, not made any finding, not adopted it, but accepted it I think is an important concept there*.

"**Mr. Garrett**:

"Yes, Your Honor. I think that's right. . . ."

Transcript, Docket no. 2008-2 CRB CD 2000-2003 (Phase I)(June 11, 2009), at 41-43 [emphasis added].

It is eminently clear from this passage that the criteria for any claimant categories upon which participants have previously relied are merely those agreed to by the Phase I/Allocation parties, and have not been "found to be controlling", or "adopted" by the CARP, the CRB, or any other "regulatory group", and, as such, are not legally controlling. Chief Judge Sledge clearly went out of his way to clarify that fact, and counsel for the JSC agreed therewith.

Citing this colloquy, the Judges in the 2000-2003 cable proceedings (Phase II) agreed that the claimant categorizations are not a product of law, but rather stipulation:

> "[T]he Judges have been clear that such categorization is not the result of any determination by the Judges. It is rather a framework and categorization that the Phase I parties have 'accepted' from time to time on a proceeding by proceeding basis. See JSC Ex. 202, quoting colloquy between former Chief Judge Sledge and counsel for Phase I claimants)."

Memorandum Opinion and Order Following Preliminary Hearing on Validity of Claims, Docket no. 2008-2 CRB 2000-2003 (Phase II) (Mar. 21, 2013), at 14.

B. THE CLAIMANT CATEGORY DEFINITIONS HISTORICALLY UTILIZED ARE ARBITRARY, PRODUCE COUNTERINTUITIVE RESULTS, AND ARE CONTRARY TO COMMON UNDERSTANDING.

Inherently problematic to the claimant category definitions (that have been historically utilized) is the fact that they do not uniformly distinguish themselves by a *type* of programming. Certain definitions rely on a type of programming (e.g., devotional programming), whereas others rely on the *nationality* of the claimant (sports programming, Canadian claimant programming), or the *location* of the originating over-the-air broadcast (e.g., sports programming, Canadian claimant programming), or the commercial/non-commercial nature of the broadcaster, or a combination of the foregoing. Further, misnomers for the programming are interspersed, such as when "Canadian claimant programming" includes *any* non-U.S. copyright owner, e.g., European owners, rather than just Canadian claimants. Predictably, absurd distinctions result.

In certain circumstances, while potential redundancy exists, there is little to no consequence to this means of categorization. For example, although the identical program *could* appear on both commercial and non-commercial originating broadcasts, the examples are few and far between. Nonetheless, Multigroup Claimants and its predecessor IPG have represented entities from

Canada, Europe and Asia, whose works are broadcast on both Canadian and U.S. stations. In order to be fully compensated for these works, such entities require the prosecution of claims in both the Canadian Claimants category and Program Suppliers category for the *same* program being compensated exclusively for retransmissions in the U.S. seen exclusively by U.S. viewers.2 No differently, a non-U.S. owned sports programming broadcast that originates from Mexico, the U.S., and Canada, would be required to seek compensation from three different categories: the Mexican-originated broadcast from the Program Suppliers category; the U.S.-originated broadcast from the "sports programming" category; and the Canadian-originated broadcast from the Canadian Claimants Group. The question is begged, of course, whether U.S. system operators somehow regard this programming differently solely because of the originated station of broadcast, which is highly unlikely.

While contradictions abound, for purposes of its comments, Multigroup Claimants only challenges the definition of "sports programming" at this juncture, and the definition of the Canadian Claimants Group to the extent that it relates

2 Given that the Canadian Claimants Group only makes claim for the retransmission of Canadian-originated broadcasts, and Canadian-originated broadcasts are not compensable in the satellite distribution proceedings, the contradiction described only relates to the cable distribution proceedings.

thereto.3 As should be evident, the previously stipulated definition of "sports programming" was fashioned for the singular purpose of limiting the definition to the programming claimed by the handful of members of the Joint Sports Claimants.4 All too pleased to expand the definition of their own category, the beneficiaries of the narrowing definition – the Canadian Claimants Group and the Program Suppliers -- welcomed into their fold sports programming that did not meet the stringent definition set forth by the historically utilized criteria.

As historically stipulated, the "sports programming" claimant category

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3 Independent Producers Group ("IPG"), a predecessor in interest of Multigroup Claimants, previously addressed the definition of the inapposite "sports programming" definition in the 2000-2003 cable proceedings (Phase II). Thereat, despite the fact that all public notices requested parties to merely identify whether they were making claim for Phase II "sports programming" royalties, the Judges ruled that by not participating in the Phase I proceedings, IPG was collaterally estopped from contesting the "sports programming" definition that was privately stipulated without notice to affected Phase II parties only *after* the aforementioned public notices were issued. *Order on Motion by Joint Sports Claimants for Section 801(C) Ruling or, In the Alternative, a Paper Proceeding in the Phase I Sports Category*, Docket no. 2008-2 CRB 2000-2003 (Phase II) (May 17, 2013), at 2.

4 In fact, the stipulated definition first utilized and appearing in **Exhibit A** is to "Joint Sports", not "sports programming", despite the fact that each and every public notice requesting claimants to identify their programming for the last several decades solicits comment whether the claimant is making claim in the "sports programming" category, not the "Joint Sports" category.

comprises:

> "Live telecasts of professional and college team sports broadcast by U.S. and Canadian television stations, except for programs coming within the Canadian Claimants category as defined below."

See **Exhibit A** (emphasis added).

In turn, the definition of the Canadian Claimants claimant category comprises:

> "All programs broadcast on Canadian television stations, except (1) live telecasts of Major League Baseball, National Hockey League, and U.S. college team sports, and (2) other programs owned by U.S. copyright owners."

Id.

Clearly, no inherent difference exists that would suggest that a "tape delayed" sports broadcast would be considered differently by a system operator than a "live" telecast, or even rebroadcast of a previously broadcast sporting event. What makes a "live" broadcast of a sporting event more "sporty" than a tape delayed broadcast? Clearly nothing, as it is the exact same content simply exhibited at a later time. As such, while the live broadcast is most certainly more valuable (a subject for the "Phase II"/Distribution proceedings) there is no logical basis for putting the re-broadcast of a taped sporting event in a different subject category than a re-

broadcast of the same live sporting event.5 Notwithstanding, any tape delayed broadcast or rebroadcast of sports programming is rejected from the "sports programming" category.

No inherent difference exists that would suggest that non-college amateur sports would be considered differently by a system operator than "professional and college" sports broadcast. Although dismissed for other reasons, the FIFA World Cup matches are generally regarded as drawing more viewership than any other sports broadcasts worldwide. Similarly, the Olympics and U.S. Olympic Trials generate significant viewership. Notwithstanding, in prior proceedings the Joint Sports Claimants challenged *all* of these as not being in the "sports programming" category, according to the definitions historically utilized.

No inherent difference exists that would suggest that broadcasts of *individual* sports (e.g., golf, ice skating, boxing) would be considered differently by a system operator than broadcasts of a "team" sport. Again, despite the obvious "sports" nature of such programming and the significant draw of such programming, such sports broadcasts are excluded from the sports programming category because of

5 For years, Notre Dame University syndicated its Saturday football game broadcasts for viewing across the U.S. on Sunday. To suggest that there was some change of character because it was seen a day later than its initial live broadcast, ignores the reality that resulted in the syndication of such programming.

the arbitrarily narrow definition historically utilized.

No inherent difference exists that would suggest that a broadcast originating in Mexico (and retransmitted in the U.S. to U.S. viewers) would be considered different by a system operator than broadcasts of the identical program originating from either the U.S. or Canada (and also retransmitted in the U.S. to U.S. viewers). Again, and despite the fact that Spanish-language programming originally broadcast in Mexico has grown exponentially in the U.S. retransmission market, such sports programming is automatically excluded from the "sports programming" claimant category. Into which Phase I/Allocation category such broadcast would land according to a strict reading of the historically utilized definitions is unclear, but such broadcasts have historically been placed in the catch-all Program Suppliers category.6

No inherent difference exists that would suggest that a broadcast of a

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6 The "Program Suppliers" definition includes "syndicated series, specials and movies, other than Devotional Claimants programs". See **Exhibit A**. Nonetheless, the subsequent definition thereof includes, *inter alia*, a broader inclusion of "programs licensed to and broadcast by at least one U.S. commercial television station during the calendar year in question." Such definition would evidently include programs falling under the "Joint Sports" definition and multiple other categories, yet unlike the reference to "Devotional Claimants", no comparable reference to the "Joint Sports" definition or the other categories appears.

"predominately sports nature" would be considered different than broadcasts according the historically utilized "sports programming" definition, as the audience is exactly the same. Obviously, the equivalent of either a sports highlights show or a program such as ESPN Sportscenter appeals to the identical audience as are watching sports broadcasts falling under the definition historically utilized for "sports programming".7

Finally, the fact that the "sports programming" category is itself defined by reference to the Canadian Claimants category, and that category actually *names specific copyright owner claimants* within its definition, resoundingly demonstrates that such claimant category was not defined according to any perceived difference in perception by system operators, but rather by the desires of the Joint Sports Claimants to narrow its definition to only such programming as may include its members.

7 Multigroup Claimants realizes that ESPN Sportscenter is a cable delivered program that is not the subject of an over-the-air rebroadcast, but uses such program just to demonstrate its point as to similarly structured programs appearing on over-the-air stations.

C. THE CLAIMANT CATEGORY DEFINITIONS HISTORICALLY UTILIZED ARE MISALIGNED WITH SYSTEM OPERATOR DECISIONMAKING.

To the knowledge of Multigroup Claimants, no information or study has ever been presented in allocation or distribution proceedings which demonstrates that system operators select programming according to the criteria that differentiates the narrower definition of "sports programming" from what is more generally understood to be "sports programming". If such information or study existed, *then* the discriminating criteria infused into the historically utilized "sports programming" definition could be rationalized. In the absence of any such information or data, however, the definition historically utilized is revealed for what it is, a self-serving definition structured to impede any Phase II/Distribution sports programming claims.

D. THE DEFINITION ATTRIBUTED TO "SPORTS PROGRAMMING" HAS A DRAMATIC MONETARY CONSEQUENCE.

The Judges have previously ruled that the criteria for allocation to a claimant category is different from the criteria for distribution within a claimant category. According to the Judges' rulings, the decision making by system operators are considered for Phase I/Allocation, while decision making by subscribers are

considered for Phase II/Distribution.8 This determination highlights the fact that the ascribed value of a program in these proceedings – despite having *identical* viewership -- will differ based on which claimant category into which it is placed.

For example, the ascribed value of program with any given viewership will almost certainly be different if placed in a claimant category that contains 2-4% of the aggregate retransmitted viewership and receives 32% of the Allocation funds (i.e., sports programming), as opposed to being placed in a claimant category that contains 45%-50% of the aggregate retransmitted viewership and receives only 26% of the Allocation funds (i.e., Program Suppliers).9 Presuming for the sake of argument that a comparable percentage of potential claimants makes claim in each claimant category, a program claimed in the sports programming category will be valued at approximately *fourteen* times the value of the same program if placed in the Program Suppliers category – a mathematical truism.10

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8 See *Final Determination of Royalty Distribution*, Docket no. 2012-6 CRB CD 2004-2009 (Phase II), Docket no. 2012-7 CRB SD 1999-2009 (Phase II), at 7.

9 Cf. "Royalty Allocations" and "Gray Viewing Shares" for sports programming category and Program Suppliers category; *Distribution of Cable Royalty Funds*, Docket no. 14-CRB-0010-CD (2010-2013)(Feb. 12, 2019), at 3552, 3593.

10 32%/4% = 8 (sports programming); 26%/45% = .5777 (Program Suppliers). 8/.5777 = 13.84.

It is therefore imperative that the claimant categories that are utilized accurately reflect the criteria by which system operators discriminate amongst programming when selecting which broadcast stations to retransmit. Failure to do so would otherwise render the value ascribed to any particular program – despite the overwhelming amount of data secured, analyzed, and presented to the Judges -- merely an arbitrary figure.

CONCLUSION

To argue that programming such as the Olympics, the FIFA World Cup, or any of a multitude of well-know golf tournaments (e.g., the Masters) are not "sports programming" in the eyes of system operators and viewers, is simply indefensible. The fact that no data exists to suggest that such programming is regarded fundamentally different by system operators or viewers than the "Joint Sports" definition programs when electing which broadcast stations to retransmit, allows the Judges to impose common sense. For the foregoing reasons, Multigroup Claimants proposes that the definition of "sports programming" (and Canadian Claimants) be re-evaluated, and modified to exclude the permutations of definition that afford no legitimate basis of distinction.

Specifically, Multigroup Claimants proposes that the definition of sports programming be identified to more broadly include "programming of a

predominately sports nature", comparable to the definition utilized for the definition of the Devotional programming category. Multigroup Claimants proposes that any limitation to "live" broadcasts, "professional or college" sports, "team" sports, broadcasts "by U.S. and Canadian television stations", be removed. In turn, the Canadian Claimants definition should be modified to exclude all "programming of a predominately sports nature", rather than excluding the programming of only a handful of Joint Sports Claimants.11

Respectfully submitted,

Dated: April 19, 2019

_____/s/_____
Brian D. Boydston, Esq.
California State Bar No. 155614

PICK & BOYDSTON, LLP
2288 Westwood Blvd., Ste. 212
Los Angeles, California 90064
Telephone: (213)624-1996
Facsimile: (213)624-9073
Email: brianb@ix.netcom.com

Attorneys for Multigroup Claimants

11 Obviously, this latter revision would have no consequence other in the cable distribution proceedings.

CERTIFICATE OF SERVICE

I hereby certify that on this 19th of April, 2019, a copy of the foregoing was sent by electronic mail to the parties listed on the attached Service List.

_____/s/_____
Brian D. Boydston, Esq.

MPAA-REPRESENTED PROGRAM SUPPLIERS

Gregory O. Olaniran, Esq.
MITCHELL SILBERBERG & KNUPP LLP
1818 n Street N.W., 8th Floor
Washington, DC 20036
Tel: 202-355-7817
goo@msk.com; lhp@msk.com

NATIONAL ASSOCIATION OF BROADCASTERS

John I. Stewart, Esq.
CROWELL & MORING LLP
1001 Pennsylvania Avenue NW
Washington, DC 20004
Tel: 202-6242-2685
jstewart@crowell.com

CANADIAN CLAIMANTS GROUP

L. Kendall Satterfield, Esq.
SATTERFIELD PLLC
1629 K Street, NW, St 300
Washington, DC 20006
Tel: 202-337-8000

LKSATTERFIELD@SATTERFIELD-PLLC.COM

LARSON & GATSON LLP
200 S. Robles Ave., Suite 530
Pasadena, CA 91101
Tel: 626-795-6001
Victor.cosentino@larsongaston.com

ARENA FOOTBALL ONE, LLC

Edward S. Hammerman, Esq.
HAMMERMAN PLLC
5335 Wisconsin Avenue NW, #440
Washington, DC 20015
TED@COPYRIGHTROYALTIES.COM

CERTAIN DEVOTIONAL CLAIMANTS

Arnold P. Lutzker, Esq.
LUTZKER & LUTZKER LLP
1233 20th Street, NW , Suite 703
Washington, DC 20036
Tel: 202-408-7600
arnie@lutzker.com

Matthew MacLean, Esq.
PILSBURY WINTHROP SHAW PITTMAN LLP
1200 Seventeenth Street NW
Washington, DC 20036
Matthew.maclean@pillsburylaw.com
clifford.harrington@pillsburylaw.com

JOINT SPORTS CLAIMANTS

Robert Alan Garrett, Esq.
Michael E. Kientzle, Esq.
ARNOLD AND PORTER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
Tel: 202-942-5000
Robert.garrett@apks.com; sean.laane@apks.com; Michael.kientzle@apks.com

Thomas J. Ostertag
OFFICE OF THE COMMISSIONER OF BASEBALL
245 Park Avenue
New York, NY 10167
Tel: 212-931-7800
Tom.ostertag@mlb.com

Phillip R. Hochberg, Esq.
LAW OFFICES OF PHILLIP R. HOCHBERG
12505 Park Potomac Avenue, 6th Floor
Potomac, MD 20854
Tel: 301-230-6572
phochberg@shulmanrogers.com

Ritchie T. Thomas, Esq.
SQUIRE PATTON BOGGS
2550 M Street Northwest
Washington, DC 20037
Tel: 202-457-6000
Ritchie.thomas@squirepb.com

MUSIC CLAIMANTS

AMERICAN SOCIETY OF COMPOSERS, AUTHORS, AND PUBLISHERS

Samuel Mosenkis
ASCAP

One Lincoln Plaza
1900 Broadway
New York, NY 10023
Tel: 212-621-6450
smosenkis@ascap.com; jwagener@ascap.com

BROADCAST MUSIC, INC.

Joseph DiMona
BROADCAST MUSIC, INC.
7 World Trade Center
250 Greenwich Street
New York, NY 10007-0030
Tel: 212-220-3149
jdimona@bmi.com

Brian A. Coleman, Esq.
Jennifer T. Criss, Esq.
DRINKER BIDDLE & REATH LLP
1500 K Street, NW – Suite 1100
Washington, DC 20005
Tel: 202-842-8800
Michael.remington@dbr.com; brian.coleman@dbr.com; Jennifer.criss@dbr.com

NATIONAL PUBLIC RADIO

Gregory A. Lewis
NATIONAL PUBLIC RADIO
1111 North Capitol Street, NE
Washington, DC 20002
Tel: 202-513-2050
glewis@npr.org

SESAC, INC.

John C. Beiter, Esq.
Beiter Law Firm, PLLC
P.O. Box 120433
Nashville, TN 37212
john@beiterlaw.com

Christos P. Badavas
SESAC
152 West 57th Street, 57th Floor
New York, NY 10019
Tel: 212-586-3450
cbadavas@sesac.com

BROADCASTER CLAIMANTS GROUP

John I. Stewart, Esq.
Ann Mace, Esq.
David Ervin, Esq.
CROWELL & MORING LLP
1001 Pennsylvania Ave., NW
Washington, DC 20004-2595
Email: jstewart@crowell.com

Richie T. Thomas, Esq.
SQUIRE PATTON BOGGS
2550 M Street Northwest
Washington, D.C., 20037
Email: Richie.thomas@squirepb.com

PUBLIC BROADCASTING

Covington & Burlington, LLP
Ronald G. Dove, Jr., Esq.

One City Center
850 Tenth Street, NW
Washington, D.C., 20001-4956

RDOVE@COV.COM, LTONSAGER@COV.COM, DCHO@COV.COM

EXHIBIT A

Before the
COPYRIGHT ARBITRATION ROYALTY PANEL
LIBRARY OF CONGRESS
Washington, D.C. 20024

In the Matter of:	)	
1990-1992 Cable Royalty Distribution Proceeding	)	Docket No. 94-3, CARP CD 90-92

STIPULATION OF THE PARTIES ON THE ISSUES OF PROGRAM CATEGORIZATION AND SCOPE OF CLAIMS

The undersigned parties, representing all Phase I parties to the 1990-1992 cable royalty funds, file this stipulation with respect to an issue they believe has been raised by the Panel in questions to various witnesses testifying on behalf of the Devotional Claimants and others. The issue concerns the extent to which Phase I claims are being prosecuted by fewer than all of the claimants whose programs are included within the Phase I program category.

Since the first cable royalty distribution, covering 1978, the Copyright Royalty Tribunal divided its royalty distribution cases into Phase I and Phase II proceedings. In Phase I, the Tribunal allocated the entire royalty fund among broadly defined Phase I program categories. In Phase II, to the extent necessary, the Tribunal resolved disputes among different claimants or groups of claimants within a single Phase I category as to the internal division of the category's Phase I allocation.

The Phase I categories themselves developed over the course of the first five years of Tribunal proceedings. In response to requests by various parties for

rulings on close or disputed questions about particular programs, the Tribunal refined the category definitions through declaratory rulings and rulings published as part of its final determinations. See, e.g., 1984 Cable Royalty Distribution Proceeding, 52 Fed. Reg. 8408, 8416 (Mar. 17, 1987); Advisory Opinion, Docket No. CRT 85-4 84 CD (May 16, 1986). For the 1990-1992 proceeding, the parties stipulate that the following Phase I category definitions, based on these prior Tribunal rulings, should apply:

Phase I Program Category Definitions

"Program Suppliers." Syndicated series, specials and movies, other than Devotional Claimants programs as defined below. Syndicated series and specials are defined as including (1) programs licensed to and broadcast by at least one U.S. commercial television station during the calendar year in question, (2) programs produced by or for a broadcast station that are broadcast by two or more U.S. television stations during the calendar year in question, and (3) programs produced by or for a U.S. commercial television station that are comprised predominantly of syndicated elements, such as music video shows, cartoon shows, "PM Magazine," and locally hosted movie shows.

"Joint Sports." Live telecasts of professional and college team sports broadcast by U.S. and Canadian television stations, except for programs coming within the Canadian Claimants category as defined below.

"Commercial Television." Programs produced by or for a U.S. commercial television station and broadcast only by that one station during the calendar year in question and not coming within the exception described in subpart 3) of the "Program Suppliers" definition.

"Public Broadcasting." All programs broadcast on U.S. noncommercial educational television stations.

"Devotional Claimants." Syndicated programs of a primarily religious theme, not limited to those produced by or for religious institutions.

"Canadian Claimants." All programs broadcast on Canadian television stations, except (1) live telecasts of Major League Baseball, National Hockey League, and U.S. college team sports, and (2) other programs owned by U. S. copyright owners.

These categories are intended to cover all non-network television programs on all stations retransmitted as distant signals by U.S. cable systems during 1990-1992, on a mutually exclusive basis. The six categories are represented in the Phase I proceedings, respectively, by the undersigned parties. Some of those categories are principally represented by trade associations or other pre-existing entities, while others are represented by ad hoc groups of claimants within the category which have joined together for the purpose of the Phase I hearing. In either case, the relationships between the claimants and the Phase I representatives are a matter of private agreement and are not at issue in this Phase I proceeding. In all cases, the Phase I representatives are seeking a Phase I royalty allocation for all programs within the category.

The final distribution of royalties to individual claimants whose programs are within each category will follow either a settlement among all claimants within the category or the resolution of any disputes through a separate Phase II proceeding. The extent to which the particular Phase I party actually represents the ultimate interests of each and every claimant within the category has historically been addressed, if necessary, in Phase II.

A related issue is the extent to which timely claims were filed with the Copyright Office for all programs contained within each Phase I category. If the owner of a program that fits within one of the Phase I categories fails to file a claim, it might be argued that the Phase I allocation to the category should

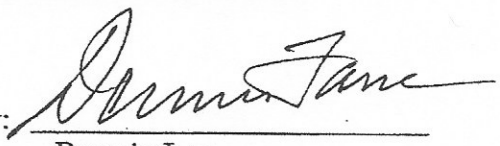
somehow be proportionally diminished. This so-called "unclaimed funds" issue, however, was resolved by the Tribunal in the course of its 1978 proceeding. The Tribunal determined that, for Phase I purposes, it should treat each category as if claims had been filed for all included programs. 1978 Cable Royalty Distribution Determination, 45 Fed. Reg. 63026, 63042 (Sept. 23, 1980).

The parties stipulate that the Panel should apply the same approach in this proceeding as the Tribunal did in the past, and should allocate all royalties among the six Phase I categories on the basis of all retransmitted programs coming within the respective definitions of those categories.

The parties would be pleased to discuss any aspect of this Stipulation with the members of the Panel at the Panel's convenience.

Respectfully submitted,

PROGRAM SUPPLIERS

By: 

Dennis Lane
John M. Collins
John E. McCaffrey
Morrison & Hecker, LLP
Suite 800
1150 Eighteenth Street, N.W.
Washington, D.C. 20036

JOINT SPORTS CLAIMANTS

By: _____
Robert Alan Garrett
David P. Gersch
Kathleen A. Behan
Peter G. Neiman
Arnold & Porter
555 Twelfth Street, N.W.
Washington, D.C. 20004-1202

NATIONAL ASSOCIATION OF BROADCASTERS

By: _____
John I. Stewart, Jr.
Jacqueline E. Hand
Jessica R. Herrera
Crowell & Moring
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2595

PUBLIC BROADCASTING SERVICE

By: _____
Timothy C. Hester
Michele J. Woods
Covington & Burling
P.O. Box 7566
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044-7566

DEVOTIONAL CLAIMANTS

By: Richard M. Campanelli BY

George R. Grange, II
Richard M. Campanelli
Jane Allison Austin
Gammon & Grange, P.C.
Seventh Floor
8280 Greensboro Drive
McLean, VA 22102-3807

By: Barry H. Gottfried

Clifford M. Harrington
Barry H. Gottfried
Heidi Atassi Gaffney
Fisher, Wayland, Cooper, Leader & Zaragoza, LLP
Suite 400
2001 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-1851

By: John H. Midlen, Jr. BY

John H. Midlen, Jr.
John H. Midlen, Jr., Chartered
3238 Prospect Street, N.W.
Washington, D.C. 20007-3214

CANADIAN CLAIMANTS

By: Kendall Satterfield

L. Kendall Satterfield
Victor J. Cosentino
Finkelstein, Thompson & Loughran
Suite 304
2828 Pennsylvania Avenue, N.W.
Washington, D.C. 20007

February 23, 1996

Proof of Delivery

I hereby certify that on Friday, April 19, 2019 I provided a true and correct copy of the •Multigroup Claimants' Comments on Claimant Category Definitions And Proposed Modification to the following:

SESAC Performing Rights, LLC, represented by John C. Beiter served via Electronic Service at john@beiterlaw.com

Major League Soccer, L.L.C., represented by Edward S. Hammerman served via Electronic Service at ted@copyrightroyalties.com

Joint Sports Claimants, represented by Robert A Garrett served via Electronic Service at robert.garrett@apks.com

Devotional Claimants, represented by Arnold P Lutzker served via Electronic Service at arnie@lutzker.com

Global Music Rights, LLC, represented by Scott A Zebrak served via Electronic Service at scott@oandzlaw.com

American Society of Composers, Authors and Publishers (ASCAP), represented by Sam Mosenkis served via Electronic Service at smosenkis@ascap.com

Broadcast Music, Inc., represented by Jennifer T. Criss served via Electronic Service at jennifer.criss@dbr.com

circle god network inc d/b/a david powell, represented by david powell served via Electronic Service at davidpowell008@yahoo.com

Program Suppliers, represented by Gregory O Olaniran served via Electronic Service at goo@msk.com

Broadcaster Claimants Group, represented by John Stewart served via Electronic Service at jstewart@crowell.com

Signed: /s/ Brian D Boydston